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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior, *Respondent*.

REPLY FOR PETITIONERS

SIDNEY DICKSTEIN
1411 K Street, N. W.
Washington 5, D. C.
Attorney for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CITATIONS

CASES: Page

Barta v. Oglala Sioux Tribe of Pine Ridge Reservation (8 Cir.), 259 F. 2d 553 2

Greene v. McElroy, 360 U.S. 474 (1959) 3

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, (1951) 2

Leedom v. Kyne, 358 U.S. 184 (1958) 3

Native American Church v. Navajo Tribal Council (10 Cir.), 272 F. 2d 131 2

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 2

Poe v. Ullman, 367 U.S. 497 (1961) 2

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 4

State of Arizona v. Mary Attakai, Superior Ct. Coconino County, Criminal Cause No, 4098, July 26, 1960 (not reported) 4

Terrace v. Thompson, 263 U.S. 197 (1923) 2

Truax v. Raich, 239 U.S. 33 (1915) 2, 3

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 2

STATUTES:

Revised Statutes § 463, 25 U.S.C. § 2 3

Arizona Rev. Stat., § 36-1061 4

Rev. Code of Montana, § 94-35-123 4

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REPLY FOR PETITIONERS

I.

Respondent finally admits that his "act of approval in 1959 was a prerequisite to the effective adoption of the [Navajo anti-peyote] ordinance."[1] (Res. Br., p. 5). But despite this admission and his failure to even dispute the importance of the "Questions Presented", respondent argues that the petition should be denied because he does not enforce the ordinance, and, there-

[1] Compare the holding of the court below which treats the Secretary's approval as nothing more than a disavowal of federal authority (Pet., App. A, pp. 6a-7a).

fore, no justiciable controversy exists between him and petitioners (Res. Br. p. 5).

Respondent recommends that petitioners challenge *his* violation of the federal constitution in a suit directed against non-federal officials whose immunity from constitutional restraints has already been established. *Native American Church* v. *Navajo Tribal Council* (10 Cir.), 272 F. 2d 131;[2] cf. *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation* (8 Cir.), 259 F. 2d 553, certiorari denied, 358 U.S. 932. The proposed remedy is no remedy at all.

Upon examination of respondent's argument it is apparent he is really saying that his "act of approval" does not affect petitioners with sufficient "directness" to give them standing to sue. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153-154 (1951). But where the enforcing authorities have been accorded immunity by reason of tribal "sovereignty", it is plain that petitioners have "standing" to challenge the Secretary's "act of approval." *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386(1926; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-536 (1925); *Terrace* v. *Thompson*, 262 U.S. 197, 214-216 (1923); cf. *Truax* v. *Raich*, 239 U.S. 33 (1915). Here, while it is the tribal authorities who are *actively* enforcing the ordinance,[3] their power, and indeed, their compulsion to act was and continues to be subject to the will of the Secretary. In this sense the relation-

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[2] The Government suggests that the "merits of that decision • • • are not free from doubt" (Res. Br., p. 6). In the court below it urged that the holding was both "sound" and "binding" (Appellee's Br., p. 7).

[3] For this reason, *Poe* v. *Ullman*, 367 U.S. 497 (1961), is completely inapplicable.

ship of the Secretary to the tribe, is the same as the relationship of the Attorney General to the private employer in *Truax* or the Secretary of Defense to the defense contractor in *Greene* v. *McElroy*, 360 U.S. 474 (1959).

If the Secretary's actions may not be challenged in this suit, they are entirely immune from judicial scrutiny. Under such circumstances this Court will not lightly abrogate responsibility for judicial protection of statutory or constitutional rights. *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958). Respondent's contention that his actions are immune from challenge, only serves to underscore the importance of the "Questions Presented."

II.

Respondent argues that "even if the Court grants this petition, it will not be required to reach the 'ultimate' constitutional issue"[4] since "the record is substantially lacking in evidence or findings as to the nature of peyote and its degree of harmfulness." (Res. Br., pp. 7-8). Respondent is wrong. For purposes of this case, the nature of peyote is not an issue of fact to be resolved by a judicial finding. The facts on which the constitutional issue turns were found by the Commissioner of Indian Affairs who determined that: "by the preponderance of evidence, (a) peyote is not a habit-forming or a deleterious drug, and (b) its ceremonial use is, in the minds of the mem-

[4] We agree that the case can be resolved without reaching the constitutional issue since the court could conclude that the Secretary's actions were in excess of his statutory authority under Revised Statute § 463, 25 U.S.C. § 2.

bers of the cult, truly a religious one." (J.A. 13)[5] A judicial declaration of the validity of administrative action based thereon, can only be made in the light of those findings. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
1411 K Street, N. W.
Washington 5, D. C.
Attorney for Petitioners

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[5] Lest the Court be misguided by respondent's citation of other "authorities", we note that the Bureau of Enforcement of the Food and Drug Administration does not take the position "that distribution of peyote for use by Indians in traditional ceremonies of a religious nature constitutes a violation of [federal] law" (letter to Native American Church, June 11, 1959); the Legislature of the State of Montana has amended Section 94-35-123 of the Revised Codes to prevent its applicability to the use of peyote "for religious sacramental purposes by any bona fide religious organization incorporated under the laws of the State"; and the state courts of Arizona have held that Arizona Rev. Stat. 36-1061 may not constitutionally be applied to the use of peyote in Indian religious ceremonies. *State of Arizona* v. *Mary Attakai*, Superior Court, Coconino County, Criminal Cause No. 4098, (July 26, 1960), appeal dismissed, Supreme Court of Arizona (April 27, 1961).